DOCUMENT RESUME

ED 360 678 EA 025 060

AUTHOR Gittins, Naomi E.
TITLE Responding to Child Abuse in the Schools: Issues in Interagency Cooperation.
INSTITUTION National School Boards Association, Alexandria, VA. Council of School Attorneys.
PUB DATE May 93
NOTE 8p.
AVAILABLE FROM National School Boards Association Council of School Attorneys, 1680 Duke Street, Alexandria, VA 22314.
PUB TYPE Journal Articles (080) -- Guides - Non-Classroom Use (055)
JOURNAL CIT Inquiry & Analysis; p1-7 May 1993

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Agency Cooperation; *Child Abuse; *Compliance (Legal); Conflict of Interest; Elementary Secondary Education; Legal Problems; *Legal Responsibility; Personnel Policy; *School Responsibility

ABSTRACT

This article examines the legal and practical issues that school officials should consider in handling a case of child abuse allegedly committed by a school employee. It suggests ways in which school officials can work with other involved parties to best serve the child's needs without compromising the district's ability to meet its own legal responsibilities. Information is provided on state cooperation statutes, which include laws that mandate interagency cooperation and the use of interdisciplinary child protection teams. Confidentiality provisions that regulate the use of child abuse, student, and personnel records, are reviewed next. Ways to overcome potential conflicts of interest in interagency cooperation during the reporting and investigating phases are described in the next section. Possible problem areas during investigation involve authority, unqualified child interviewers, advanced notice to the accused, and case disposition. Finally, suggestions for dealing with parents are offered. It is concluded that interagency cooperation can help a school district respond effectively to charges of abuse by school employees. Whether through formal statutes or the development of working relationships based on mutual trust, schools can meet their own legal obligations without interfering with the efforts of other governmental agencies to combat child abuse. (LMI)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED 360 678

INQUIRY & ANALYSIS

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy

Inside:

- Case Notes
- Supreme Court News
- In Washington
- Bylaws

May 1993

PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
J. Floyd
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Responding to Child Abuse in the Schools: Issues in Interagency Cooperation

By Naomi Gittins, Staff Attorney, NSBA, Alexandria, Virginia

INTRODUCTION

Many recent efforts at improving the well-being of children in our society have focused on how public agencies can work together in order to eliminate duplication, to close gaps and to make services more responsive to individual needs.[1] These collaborative efforts are becoming more frequent in how government responds to cases of child maltreatment, with many state codes explicitly mandating interagency cooperation and providing mechanisms for shared communications where confidentiality rules might otherwise discourage information exchange. While these state statutory provisions usually call for coordination between child protective services (CPS) departments and law enforcement entities such as the police and local prosecutors, school involvement in such cases is becoming more common and is of absolute necessity when the abuse is alleged to have been committed by a school employee.

This article will examine the legal and practical issues school officials should consider in handling a case of abuse allegedly committed by a school employee and suggest ways in which schools can work with the other parties involved in order to best serve the needs of the child while not neglecting their own obligations nor unduly interfering with the interests and responsibilities of others.[2] While this discussion will focus primarily on inter-cooperation at the investigative stage, its purpose is not to give comprehensive advice on appropriate investigative techniques.[3]

The interests of the parties vary with the type of maltreatment involved and the current status of the case. These factors can, of course, affect how easily coordination and collaboration are achieved. While all the parties may agree that the child's welfare is paramount, each agency has its own perspective on how best

1. NSBA has promoted legislation currently before Congress which encourages interagency cooperation to respond to the needs of the hole child in order to enable and enhance learning experiences in schools. Link-Up for Learning Act, H.R. 520, S. 48.

2. This article does not deal with interagency communications related to screening prospective employees for past criminal or abuse history. *See* Mann, J. "Negligent Hiring and Retention of Unfit Employees: Scope of a School District's Liability," *School Law in Review—1991*, at 7-1 (NSBA 1991); Howard, S. "Employment Reference Checks and Liability Issues," *Inquiry and Analysis*, September 1990, at 1. It also does not discuss the communication that should take place between local school districts and state boards of education or other state licensing authorities when it is determined that a school employee has engaged in child abuse. Some states require law enforcement authorities to notify the board that issues teaching certificates of convictions or arrests of teachers for child abuse. *See*, e.g., Ariz. Rev. Stat. Ann. § 15-510(B); Cal. Penal Code § 291, 291.5; Conn Gen. Stat. § 17-38a(f)(4). Iowa by administrative regulation requires the level one investigator to file a complaint with the State Board of Educational Examiners in cases of founded or admitted abuse. Filing a complaint is discretionary where the accused employee voluntarily resigns without admitting the truth of the allegations. Iowa Model Policy 102.11. Relaying such information to the licensing entity with power to revoke teaching certificates would appear to be an effective means of preventing an abusive employee who has been discharged from simply seeking employment in another location.

3. *See* Frels, K. and Bump, R. *Investigating Alleged Wrongdoing by Employees in the School Setting* (NSBA 1990); Biggs, J. and Rice, K. *School Administrators Guide to Investigations* (Wash. Educ. Resource Inc. 1992).

INQUIRY & ANALYSIS is a bi-monthly publication of the NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, Virginia 22314. John G. Mayer, Jr., Council Chairman; William M. Soult, NSBA President; Thomas A. Shannon, NSBA Executive Director; August W. Steinhilber, Associate Executive Director and General Counsel; Gwendolyn H. Gregory, Deputy General Counsel; Susan R. Butler, Director, Administration; Alison Pruitt, Manager, Legal Services; Naomi E. Gittins, Staff Attorney and Editor; and Raymond D. Kline, Legal Consultant. *I&A* is a membership service of the Council or can be purchased by subscription for $75/6 issues. Copyright © 1993 by the National School Boards Association. All Rights Reserved.

BEST COPY AVAILABLE

EA 025060

to promote that interest and meet its own legal obligations. A school district, in addition to addressing concerns about the individual child involved, must also act to protect the health, safety and welfare of all its students. This could require the removal and eventual termination of the employee, if the charges are true. To take such action, the school district must have supporting facts gathered through a thorough investigation. Adequate investigations are absolutely essential to protecting the interest of the child, the accused employee and the school district by either providing evidence to support the discharge of an employee who has actually abused a student or by discovering that the allegations are unfounded. In either case, the school district has demonstrated that it exercised due care in handling the abuse complaint, thereby minimizing its exposure to liability claims.

The school district's handling of abuse allegations may at times conflict with the responsibilities of CPS or law enforcement. In addition to child abuse reporting laws, school officials who receive an abuse complaint must comply with established policies, procedures, collective bargaining agreements and state education codes—none of which apply to the other agencies. The goals of CPS workers focus primarily on determining whether or not statutorily defined child abuse or neglect has occurred and on taking necessary actions to protect and treat the child. Law enforcement agents must determine whether any criminal violation has occurred and whether sufficient evidence exists to prosecute the accused for the alleged offense. When conflicts do arise, school officials must be able to resolve the issues without compromising the district's ability to meet its own legal responsibilities. The following information may assist schools in this regard.

STATE COOPERATION STATUTES

Many states have recognized the necessity and importance of interagency cooperation in dealing with child abuse and have enacted statutes to encourage and facilitate collaboration.[4] These statutes represent a critical step in facilitating the coordination of agency efforts in abuse cases but do contain a number of shortcomings from the perspective of a school faced with responding promptly and effectively to a report of alleged abuse of a student by a school employee.

Cooperation Mandates

Although numerous states have enacted laws mandating cooperation between agencies in the handling of abuse cases, only 13 specifically mention schools or education agencies as participants in the specified collaborative efforts (other than child protection teams, discussed below). *See, e.g.*, Conn. Gen. Stat. § 17-38f; Fla. Stat. § 415.509; Iowa Code § 232.71(5), (6); Kan. Stat. Ann. § 38-1523 (b), (f), (g); Mich. Comp. Laws § 722.628(8); N.J. Stat. Ann. § 9:6-8.72a; Pa. Stat. Ann. tit. 11, § 2218; Tex. Fam. Code § 34.06; Wash. Rev. Code § 26.44.030. Other states do not explicitly refer to schools in their cooperation statutes but probably encompass them through broad categories such as, "other state and local departments, agencies, authorities and institutions shall cooperate. . ." Va. Code Ann. § 63.1-248.17. *See also* Haw. Rev. Stat. § 587-84 (every public official must render all assistance); Ind. Code § 31-6-11-10(c) (child protective services shall cooperate with and shall seek and receive cooperation of appropriate public and private agencies); Minn. Stat. § 256.01(4) (Commissioner of human services shall assist and actively cooperate with other departments, agencies and institutions); Nev. Rev. Stat. § 432B.210 (protective services must receive from state or any political subdivision or any agency any cooperation, assistance and information it requests). While some of these laws do provide for mutual cooperation, in general they appear intended to generate assistance to CPS agencies in fulfilling their statutory duties. For example, some of the statutes mention schools only in terms of their obligation to permit investigatory interviews by CPS workers or law enforcement agents to occur on school premises. Others simply direct other governmental agencies to assist CPS when requested to do so. This statutory orientation is, of course, entirely appropriate given that child abuse laws universally charge CPS or law enforcement agencies with the responsibility for investigating reported child abuse and taking appropriate action to protect abused children. While consistent with their statutory purpose, these provisions do not necessarily support school districts' own investigatory needs. Nonetheless, school districts certainly must comply with these directives to cooperate with investigations conducted by CPS and/or law enforcement agents and should attempt to develop beneficial working relationships which may lead to informal exchange of information on a case-by-case basis. Such dialogue can be extremely helpful but must always remain within the confines of the law.

Child Protection Teams

Another cooperative mechanism that increasingly appears in state child abuse statutes is the establishment of multi-disciplinary child protection teams. Over 30 states have provisions directing the creation of child protection teams; approximately half of these states make a representative from the education field either a mandatory or permissive member of the team. *See, e.g.*, Ala. Code § 26-16-50; Colo. Rev. Stat. § 19-3-303; Ill. Ann. Stat. ch. 23, § 2057.1; Ind. Code § 31-6-11-14; Mass. Gen. L. ch. 28A, § 6A; Minn. Stat. § 626.558; N.D. Cent. Code § 50-25.1-02; Utah Code Ann. § 62A-4-509; Va. Code § 63.1-248.6. School representatives may be included on child protection teams in other states as a matter of administrative policy or practice where team composition is left to the discretion of the social services agency. The functions assigned by statute to child protection teams vary from state to state, with the most prevalent role cited being to assist with or carry out the identification, diagnosis, evaluation and treatment of child abuse cases. Other frequently mentioned responsibilities include identification and coordination of services available to abused children and their families, case review or consultation, and development of community awareness and education programs. While some states limit child protection teams to advisory roles, most appear to structure them as active participants and service providers in abuse cases. A few states even specifically delegate investigatory duties to these teams. *See, e.g.*, Me. Rev. Stat. Ann. tit. 22, § 5005(2); Md. Ann. Code art. 88A, § 6(b)(2); Mo. Rev. Stat. § 210.145(a), 210.150; Nev. Rev. Stat. § 432B.350; Tenn. Code Ann. § 37-1-607; Utah Code Ann. § 62A-4-509.

Not only does a school representative's participation on a child protection team facilitate valuable exchange of information to assist in evaluating and treating specific instances of child abuse,

4. **The information on state child abuse statutes reflected in this article is based on materials presented in U.S. Dep't of Health and Human Services, *State Statutes Related to Child Abuse and Neglect* 1988 (1989). That publication contains legislative provisions signed into law before December 31, 1988. Consequently, there may have been subsequent changes in state law which are not considered or discussed in this article.**

BEST COPY AVAILABLE

the school may also use its participation on such a team as an opportunity to demonstrate its commitment to joint effort and to foster understanding of the factors that affect a school's handling of abuse reports. By doing so, the school representative may begin to lay the ground work of trust necessary to establishing cooperative agreements that reflect the interests and obligations of all the concerned parties. A particularly difficult issue to resolve will involve how information will be shared during the investigatory stage of abuse cases. A joint publication issued by the Education Commission of the States and several other concerned organizations recommends that issues of confidentiality and interagency information sharing be addressed only after a strong base of understanding and shared commitment has been established. *Confidentiality and Collaboration: Information Sharing in Interagency Efforts*, 7 (1992).

CONFIDENTIALITY PROVISIONS

Child Abuse Records

The scope of cooperative agreements will be affected by the legal restrictions placed upon information sharing by statutes, regulations, constitutional provisions and court decisions. Both federal and state laws limit access to child welfare records to specified parties with a legitimate need for the information. The Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 *et seq.*, requires that states receiving federal funds under the Act provide by statute that "all records concerning reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense." 45 C.F.R. § 1340.14(i). In general, state laws provide access to these records to persons investigating abuse reports or to those providing services to abuse victims. Several states do include school officials or education agencies among those to whom access is granted. *See, e.g.*, Conn. Gen. Stat. § 17-47a; Ky. Rev. Stat. Ann. § 620.050(4)(d); La. Rev. Stat. Ann. § 46.56(F); R.I. Gen. Laws § 42-72-8; Wash. Rev. Code § 26.44.070; Wyo. Stat. § 14-3-214. Other states could conceivably make information available to schools under other broader categories of persons to whom records may be released, such as those with legitimate need, agencies supervising child abuse victims, public officials in carrying out their official duties and mandatory reporters. Often states granting access to child abuse records limit the use of information obtained from the records or require that those with access to records promise to preserve their confidentiality. Other state statutes explicitly permit records to be released with consent of the parents and/or victims. Consent exceptions may also be established by case law or administrative regulations.

While these confidentiality restrictions on child abuse records may appear to limit the bounds of interagency cooperation, avenues that permit useful information exchange without violating the underlying privacy considerations from which the confidentiality provisions derive should be explored. For example, ECS points out that a statute may clearly prevent release of a child abuse record but not specifically prohibit a caseworker from discussing certain details of the case which also may be recorded in the official file. ECS, *Confidentiality*, at 10. Of course, statutory silence should not necessarily be interpreted as license, and such dialogue should occur only after due consideration of the legal risks entailed.

Law enforcement personnel investigating or prosecuting a case of child abuse may also be subject to the confidentiality restrictions imposed by child welfare codes. This may be explicit or else result from requirements that those parties given access to child abuse records preserve the confidentiality of the information contained therein or to restrict its use to certain specified purposes. Law enforcement entities may also be subject to public records disclosure exceptions which prohibit the release of criminal investigative reports or non-conviction data. *E.g.*, Wash. Rev. Code § 10.97.030. Again, there may be useful information which does not fall into one of these protected categories that law enforcement agents may be legally permitted to reveal.

Student Records

Schools engaged in interagency efforts in child abuse cases must adhere to the confidentiality requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g *et seq.*, which prohibits the release of student records without parental consent and gives parents the right to see their child's records.[5] Only directory information may be disclosed without consent. FERPA does not appear to be a major obstacle to interagency collaboration in school-based child abuse cases, but its requirement for parental consent should be strictly followed before releasing information from a student's record to another agency. Absent parental consent, an exception permits disclosure of information where a "health or safety emergency" exists. 20 U.S.C. § 1232g(b)(1)(I), 34 C.F.R. § 99.31(a)(10). According to a recent U.S. Department of Health and Human Services publication,

> It is the position of [the National Center on Child Abuse and Neglect] NCCAN and the Fair Information Practices Staff (the Federal unit that administers FERPA) that child abuse and neglect generally may be considered a "health or safety emergency" if the State definition of child abuse and neglect is limited to situations in which a child's health or safety is endangered. Furthermore, NCCAN and the Fair Information Practices Staff have agreed that responsibility for determining whether a "health or safety emergency" exists must be made by the school official involved, on a case-by-case basis.

Tower, C. *The Role of Educators in the Protection and Treatment of Child Abuse and Neglect*. (DHHS Pub. No. (ACI) 92-30172, 1992).

Tower also cites another exception to the prior consent rule which permits release of information in school records to "State and local officials or authorities to whom such information is specifically required to be disclosed pursuant to State statute adopted prior to November 19, 1974 ." 20 U.S.C. § 1232g(b)(1)(E). Thus, this exception would apply in States that passed child abuse reporting laws prior to that date. *Role of Educators*, at 32. However, it appears limited to that information specifically required to be disclosed in the child abuse report and not to a child's record generally.

Schools must also ensure that they observe the confidentiality requirements imposed on student records by other laws, such as the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1412 (2)(D), 1417(c), 1480(2); 34 C.F.R. §§ 300.129, 300.560-.576, 303.460 and the Public Health Service Act, 42 U.S.C. §§ 290dd-3, 290ee-3; 42 C.F.R. Part 2 (drug and alcohol abuse records).[6]

5. *See* Uhler, S. "Family Educational Rights and Privacy Act," *Inquiry and Analysis*, May 1989, at 1.

6. *See* Rubin, D. "Federal Confidentiality Requirements for School Drug Counseling Programs," *Inquiry and Analysis*, May 1991, at 1.

BEST COPY AVAILABLE

Personnel Records

When entering into interagency cooperation agreements that apply to school-based child abuse cases, schools must also carefully consider what information about an accused employee it may lawfully communicate to other parties. Laws governing the disclosure of employee records may derive from several different sources, i.e., public records disclosure statutes, right to know statutes, state education codes, administrative policies and regulations, general case law and collective bargaining agreements. There may also be special provisions in a state's child welfare code. For example, in New York the commissioner of social services is entitled to receive from other governmental agencies such assistance and data as will enable the department and local child protective services divisions to fulfill their responsibilities properly. N.Y. Soc. Serv. Law § 425(1). Where these various laws do not speak clearly or appear to conflict, reconciling them may be difficult but is essential to promoting effective interagency cooperation without infringing on the interests of any party including the accused.

Special attention must be paid to those provisions which protect certain material from public disclosure. For example, some states exempt from public access employee performance evaluations, individual salary information, preliminary or investigatory information, internal memoranda, opinion statements, disciplinary records, non-final recommendations, highly personal information, etc. Courts tend to interpret statutory exceptions to access very narrowly and place the burden on the custodian of the records to demonstrate that information withheld falls within one of the exempt categories and therefore is entitled to protection. *See, e.g., Brouillet v. Cowles Publishing Co.*, 114 Wash.2d 788, 791 P.2d 526 (Wash. 1990), 60 Educ. L. Rep. 638 (requiring release of records specifying reasons for teacher certificate revocations). Courts do not necessarily defer to agency regulations guaranteeing confidentiality of particular records, *id.* at 794, and may not uphold collective bargaining agreements that attempt to restrict access to public employee personnel files. *E.g., Mills v. Doyle*, 407 So.2d 348 (Fla. Dist. Ct. App. 1981); *Board of Education v. Areman*, 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943 (1977). These precedents generally arose out of attempts by government entities to withhold certain information from the general public or the media. Therefore, the law must be carefully scrutinized to determine whether material exempt from general public disclosure may nevertheless be exchanged by government agencies in pursuit of their official functions.

OVERCOMING POTENTIAL CONFLICTS OF INTEREST IN INTERAGENCY COOPERATION

Several points of conflicts which have proven troublesome to those concerned about school-based child abuse are discussed below.

Reporting

The first contact between schools and other agencies in school-based abuse cases will usually occur when a statutorily required report of suspected abuse is made. In all fifty states, school personnel are required to report suspected child abuse to either CPS or to law enforcement agencies. However, not all states clearly require the reporting of alleged abuse by a school employee. Federal law directs states to include in their definitions of reportable abuse, maltreatment allegedly committed by any "person who is responsible for the child's welfare," 42 U.S.C. § 5106g(5), but contains no specific reference to educational employees. The regulations do mandate inclusion of persons providing "out of home care" but again do not specifically list school personnel as part of this group. 45 C.F.R. § 1340.2(d)(4). Some state statutes have opted to require explicitly the reporting of abuse committed by school employees. *See, e.g.*, Calif. Penal Code § 11165.5; Conn. Gen. Stat. § 17-38a(b); Fla. Stat. Ann. § 415.503(11). Other state laws require reporting of abuse by school employees under definitions which do not distinguish among perpetrators. *See, e.g.*, La. Rev. Stat. Ann. § 14:403(B)(1), (2); Wash. Rev. Code Ann. § 26.44.020(12); Wis. Stat. Ann. § 48.981(1)(a). Other definitions would apparently require reporting of sexual abuse by a school employee but are less clear with regard to other forms of abuse. *See, e.g.*, Ala. Code § 26-16-2(a)(2); Mich. Comp. Laws Ann. § 722.622(c), (e). Many states, consistent with federal requirements, mandate reporting of suspected abuse committed by perpetrators designated by such terms as "person responsible for [child's] welfare," "person who has permanent or temporary care or custody or responsibility for supervision of the child," "custodian," and "person having custody or control." These terms make agency jurisdiction and reporting obligations ambiguous with respect to abuse committed by a school employee. Such vague terms may be more clearly defined in administrative regulations adopted by social service agencies to encompass school-based abuse. If so, these regulations and their legal basis should be clearly communicated to state and local school officials. Increasing the understanding of school officials as to the scope of their reporting obligations will help to reduce uncertainty that may lead to non-reporting—which may be misread as lack of cooperation or intentional concealment. School officials must equally be aware of court decisions which may provide more definitive guidance. It is especially important where no other legal guidelines exist as to reporting responsibilities in school based abuse cases, that schools establish their own formal procedures indicating the circumstances under which either CPS or law enforcement agents should be contacted or seek clarification of the issue in an interagency agreement.

Investigations

One of the more controversial areas in interagency efforts concerns the role of school personnel in the investigation of alleged child abuse by a school employee. As noted above, some states have statutes mandating that schools cooperate with investigations being conducted by CPS workers or law enforcement agents by providing access to complainants and witnesses for interviews on school grounds or providing information not otherwise protected from disclosure. School districts subject to such statutory requirements or those who choose to cooperate as a matter of policy should not interpret cooperation to mean either unquestioning deferral to the wishes and demands of these outside agencies nor as an invitation to rely on them to satisfy the obligations of the school district to investigate.

Once a school district receives a complaint or information that a school employee has abused a student, the district must move beyond passive cooperation and take affirmative steps separate from CPS or law enforcement activities. Taking independent action may in many instances be most effective if the district coordinates and consults with CPS and law enforcement personnel. Communication and collaboration whether on a case-

BEST COPY AVAILABLE

by-case basis, or under the terms of an interagency memorandum of agreement can do much to alleviate some of the concerns raised by child welfare advocates over school investigation in child abuse cases.

- Authority to Investigate

Some have suggested that school officials have no authority to investigate allegations of child abuse committed by school employees. It is true that every state charges CPS or law enforcement agencies with the duty of validating reports of suspected child abuse, but it is not clear that such jurisdiction is intended to be exclusive. Few would dispute that schools should exercise reasonable care to protect the health and safety of their students. In absence of any specific prohibition, a school should undertake a separate investigation of alleged abuse committed by a school employee, especially where there exists no agreement for information sharing between the district and CPS or law enforcement. Lacking such an agreement, a district should not assume that either CPS or law enforcement agents will want to or legally be permitted to release their investigative data to school districts. *See, e.g.*, Biggs, J. and Rice, K. *School Administrators Guide to Investigations*, 4 n. 10 (Wash. Educ. Resources, Inc. 1992)(noting cases of abuse by certificated staff in several Washington counties in which CPS and law enforcement were notified but provided no follow up information to school districts). Under such circumstances, a school district must develop its own information to support discharge of an employee who actually has abused a student. Furthermore, a school district which fails to adequately investigate charges of alleged child abuse by a school employee subjects itself to potential liability, or at least the cost of defending law suits, under both state and federal law. *See, e.g.*, *Doe v. Taylor Independent School District*, 975 F.2d 137 (5th Cir. 1992); *Stoneking v. Bradford Area School District*, 882 F.2d 730 (2d Cir. 1989) (section 1983 cases based on school officials' failure to investigate adequately reported incidents of sexual molestation of students by school employees); *Bratton v. Calkins and Deer Park School Dist.*, No. 87-2-00007-3 (Spokane Cnty., Wash. Super. Ct. July 1991)(cited in Biggs, J. *Administrators Guide*, at 11 as case of "negligent investigation" resulting in verdict for plaintiff of several hundred thousand dollars). *See also* Gregory, G. "Sexual Harassment Against Students," *Sexual Harassment in the Schools: Preventing and Defending Against Claims* (Rev. Ed.) 35 (NSBA 1993).

- Unqualified Child Interviewers

Opponents of school district investigations inevitably cite the lack of qualifications of school administrators to properly interview children and to gather and assimilate information in child abuse cases. This objection does have some foundation, particularly in cases of sexual abuse, because critical testimony by the abused child may be excluded from subsequent adjudicatory hearings if the initial interviewer unduly influenced or "contaminated" the child's account of events by asking leading or suggestive questions. Other internal factors may recommend against a school administrator conducting the investigation in a case of sexual abuse of a student by a staff member. Biggs mentions several important considerations: 1) an investigating administrator may be placed in a no win situation because of disagreements among staff as to whether the abuse occurred; 2) an investigation by a school administrator may be perceived as a cover up or at least be considered suspect; 3) an administrator may be criticized for inadequate investigation if she misses, misinterprets or fails to pursue a lead that a trained investigator would have handled differently. *Administrators Guide*, at 11.

In order to overcome these problems, Biggs recommends, and this author concurs, that school districts consider implementing a two-tier investigation process similar to the one established in the State of Iowa. *See Model Policy and Rules on Procedures for Investigating Allegations of Abuse of Students by School Employees* (Iowa Dept. of Educ. Nov. 1989). Under the Iowa system, a **trained** school employee or administrator conducts a prompt first-tier investigation which results in a tentative conclusion as to whether the allegation is well founded and whether referral to law enforcement or a second level investigator is necessary. The system contemplates full investigation and resolution of most complaints of physical abuse at the first tier level; however, serious cases of physical abuse and likely incidents of sexual abuse are referred to law enforcement if the conduct, if true, would constitute a crime or to a second tier investigator if the improper conduct would not be considered criminal but is sufficient grounds for discipline or termination. The second tier investigator should be an independent professional investigator, preferably experienced in handling abuse cases and with no personal or professional bias to predetermine outcome.

Because of the sensitive and crucial nature of the victim's testimony in a sexual abuse case, Biggs recommends that schools contact CPS or law enforcement to conduct the initial interview, especially where the child is very young. Avoiding in depth questioning of the child before a CPS or law enforcement interview would not appear to jeopardize the school's interest in gathering its own facts and would reduce the possibility of "contaminating" the child's testimony. However, school districts should seek either through an established agreement or case-by-case requests to have a school representative present at the interview conducted by CPS or law enforcement. The school person present should be someone with whom the child is familiar to help put the child at ease. *See Role of Educators*, at 26; *accord*, Hungerford, N. "Investigating and Screening Sexual Misconduct Charges and Coordination with Other Agencies," *School Law in Review—1991*, at 8-6 (NSBA 1991). Whether the school representative will actively participate in the interview should be determined by mutual agreement before the interview takes place. Some states grant CPS the authority to determine the presence and participation of a school representative at such interviews, *e.g.*, Wash. Rev. Code § 26.44.030(9), while other states specifically allow the presence of a school person, *e.g.*, Wyo. Stat. § 14-3-214.

The presence of a school employee at the CPS or law enforcement interview may also help to reduce the need for repeated questioning of the child which can re-traumatize the child. Other means, such as note taking, and audio or video recording, to "capture" the child's initial statement may be considered as long they do not interfere with the interview process or intimidate the child. The possible release of these recordings to the accused employee's attorney and their admissibility in future legal proceedings should also be factors in determining whether such techniques should be used.

- Advance Notice to the Accused

Child welfare advocates have also voiced concerns about school district practices regarding the timing and specificity of notice to an accused employee that charges of abuse have been

BEST COPY AVAILABLE

made. Although no one disputes that the accused has a right to know about such serious allegations, some feel that notice without immediate questioning allows a guilty employee time to concoct an "alibi" or cover story. However, a school may not be able to delay notification to an employee of charges made against him or her if a collective bargaining agreement or other contract term provides for immediate notice. Under such circumstances, the Iowa Model Policy provides that the contract terms shall control. The Iowa procedures, however, also comment that "[g]enerally recognized investigative technique provides that little or no notice is given to an accused person prior to being interviewed. This is to the benefit of the innocent as well as to the detriment of the guilty." Iowa Model Policy § 102.8 Comment. Consistent with this view, the policy directs that in cases of alleged physical abuse, the level one investigator will question the employee at the time the accused receives a copy of the complaint. When a sex crime has been alleged, the level one investigator makes the preliminary determination of whether the allegations are founded based solely on the interview with the student. Where collective bargaining agreements require immediate notice, the investigator can either interview the employee at the time the accused is provided a copy of the complaint or else coordinate with law enforcement authorities who will conduct a separate interview right after the employee receives notice. The policy specifically notes that even a lapse of a few hours between notice and an investigative interview is not good practice.

These procedures are not without risks. Some school attorneys have cautioned that when an employee is first notified of the charges made against him and the district's decision to suspend him pending an investigation, the employee should not be asked to respond to any specific questions. "Investigating and Screening," at 8-7. Hungerford's concerns are based on the following:

> Often the employee will not have representation at this initial meeting, which is usually scheduled quickly in order to suspend the employee and separate that employee from students during the investigation. Administration pressure to get the employee "to talk" during this meeting may backfire, resulting in an accusation that the employee was deprived of her right to representation. The sympathy of fellow employees for the accused may be aroused by a belief that the district took advantage of the staff member under investigation.

Id. To avoid these problems, deferring an interview with an employee until after a law enforcement agent has questioned the accused seems well-advised. In this manner, the employee will be interviewed by a skilled professional initially and will be able to contact an attorney or union representative for any future interviews by the school district. Of course, this practice will work most effectively where there is clear communication between the two agencies and the maximum exchange of information permitted by law.

Case Disposition

Because the agencies are charged with different responsibilities, the efforts of school districts, law enforcement and CPS may not coincide at the disposition stage. Cooperative agreements functioning during the investigatory phase may be helpful in averting some of the potential conflicts by creating a coordinated investigation which provides all parties with the information necessary to accomplish their purposes. However, other issues may still arise despite cooperative efforts.

In order to discipline abusive teachers effectively, school districts must sometimes act even where the misconduct does not rise to the level of criminal activity but nonetheless constitutes behavior warranting discipline or discharge for "immoral" conduct or neglect of duty. School districts likewise must have their own investigatory information when criminal sex abuse is involved. As Hungerford points out the law enforcement agency may for its own reasons drop the complaint without resolution or may engage in plea bargaining to a lesser charge. Even if the matter is brought to trial, it may not result in a conviction on criminal sex abuse charges. Where there is no clear cut determination of guilt through the criminal justice system or even where the staff member is acquitted, there still may be sufficient evidence to justify a district's seeking discharge. School district hearings, unlike criminal proceedings, are not subject to a "beyond a reasonable doubt" standard. "Investigating and Screening," at 8-3.

Timing of adjudicatory hearings may also have to be coordinated. Hungerford notes that the school district may be ready to conduct a disciplinary or discharge hearing before the information gathered by law enforcement even goes to a grand jury for indictment. Whether to postpone the district's action until the criminal process is completed depends on a number of factors. In some jurisdictions, a school district may be compelled by statute or contract to either begin dismissal proceedings or reinstate a suspended teacher within a specified time frame. If the school district deems a delay desirable, it will have to seek agreement from the accused's counsel to waive the statutory or contract deadline. Before making such a decision, the district must carefully weigh several factors.

> [It] depend[s] on whether the staff member will be on paid or unpaid status in the meantime, the likely days or months of delay, and the impact that conviction or exoneration would have on the district's own course of action. If, for instance, the district's own investigation convinces the superintendent that dismissal is called for because of neglect of duty, regardless of whether a criminal conviction occurs, then there would seem to be little reason for the district to delay its action.

Id. at 8-4. Hungerford also notes that a school district may decide to delay its termination proceedings if a criminal trial is scheduled which involves the same set of facts, making it likely that the employee will be advised by his attorney not to respond to certain questions by district officials which might prejudice his Fifth Amendment rights not to incriminate himself. Testimony given by an accused employee under oath at a termination hearing could be used to impeach later testimony given in a criminal trial or introduced as admissions if the employee refused to take the stand. While the district could proceed using evidence other than testimony from the accused, it could not argue that the employee's failure to respond to questions indicates "guilt." *Id.*

Where there are pending criminal proceedings, the district may also wish to coordinate the timing of its hearing with the prosecutor. The prosecutor may attempt to persuade the school district to postpone its hearing in order to avoid giving the employee's attorney an opportunity for discovery and intimidation or discrediting of key witnesses prior to the criminal trial. The school district must keep in mind that if it agrees to the delay, it will bear the additional cost of paying the teacher while

BEST COPY AVAILABLE

the criminal justice process runs its course. In addition, as noted above, there is no assurance that a conviction will result. Acquittal of an employee in a criminal trial does not preclude termination of the accused but does introduce a strong element of ambiguity into the hearing despite the difference in the standards of proof. *See* Pedersen, D. and Hartog-Rapp, F. "Discipline of Teachers for Reasons of Immorality," *Preventing and Defending Actions by School District Employees*, B173-74 (NSBA Council of School Attorneys Seminar, Aug. 1986). Conveying these general concerns to one another may help facilitate agreement on a case-by-case basis wherein each party assesses the strength and likely outcome of its case and determines the importance of the timing of its proceedings in relation to the other party. Development of a working relationship may not always produce agreement but can achieve workable compromises where lack of communication may create otherwise avoidable problems.

SCHOOL DISTRICT'S RELATIONSHIP WITH PARENTS

In cases of school based abuse, schools can do much to facilitate investigation, allay fears and suspicions and avoid potential liability by clearly communicating with the parents and child about the status and process of the case. Pedersen and Hartog-Rapp suggest that the parents and the child should be advised of the seriousness of the charge, assured of the district's support if the allegations are shown to be true, informed that the accused employee does have certain rights guaranteed by law which the school must respect and asked to report any additional contact from the employee or unusual occurrences. If the parents have not already contacted a social service or law enforcement agency and a report appears indicated, the school district should inform the parent that the matter will be reported to the appropriate agency which will also be conducting a separate investigation. Parents should be advised of the distinct responsibilities of each agency and the reasons for keeping some investigative matters separate. They should be told that their cooperation with each investigation is appropriate. "Discipline of Teachers," at B168, B175-76.

As the school district's investigation progresses, parents should be given appropriate information about the status of the case to assure them that the district is acting as quickly and vigorously as possible to reach a prompt resolution. Their confidence in the school district's response to the situation is crucial to maintaining their cooperation and to avoiding later charges of a cover-up or inadequate investigation.

CONCLUSION

Interagency cooperation can assist a school district in responding effectively to allegations of abuse by school employees. Whether through formal statutorily created mechanisms or through development of working relationships based on mutual trust and understanding, schools can meet their own obligations without interfering with the efforts of other governmental agencies to combat child abuse.

BEST COPY AVAILABLE